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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

2-WAY COMPUTING, Inc. a Nevada corporation,

Plaintiff,

v.

SPRINT SOLUTIONS, INC., a Delaware corporation; NEXTEL FINANCE COMPANY, a Delaware corporation; SPRINT UNITED MANAGEMENT COMPANY, a Kansas corporation; NEXTEL OF CALIFORNIA, INC., a Delaware corporation; NEXTEL BOOST OF CALIFORNIA, LLC, a Delaware limited liability company, and NEXTEL COMMUNICATIONS, INC., a Delaware corporation,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 2:11-cv-00012-JCM-PAL

**DEFENDANTS' MOTION TO
EXCLUDE THE TESTIMONY OF
MICHELE M. RILEY**

1 Defendants Sprint Solutions, Inc., Nextel Finance Company, Sprint United Management
2 Company, Nextel of California, Inc., Nextel Boost of California, LLC, and Nextel
3 Communications, Inc. (collectively, “Sprint”) hereby move the Court to exclude the opinion and
4 testimony of Plaintiff 2-Way Computing, Inc.’s damages expert, Michele M. Riley. As explained
5 further below, Ms. Riley’s opinions are unreliable, and should therefore be excluded for three
6 reasons.

7 **First**, Ms. Riley failed to do any analysis to apportion the value that the allegedly
8 infringing features contribute toward the revenue Sprint earned from a \$5 per month fee that
9 Sprint charged to some customers for Push-to-Talk (“PTT”) services. Rather, Ms. Riley assumed
10 that the entire revenues Sprint earned from this \$5 monthly fee for some customers was
11 appropriate as a royalty base for all Sprint PTT phones. However, Sprint also charged this fee to
12 some customers for the use of PTT on its QChat phones, but this Court held that the QChat phones
13 do not infringe the ’797 Patent as a matter of law. The fact that PTT is used on non-infringing as
14 well as allegedly infringing phones means that the \$5 per month fee Ms. Riley used for her royalty
15 base is not the product of demand for the *patented features* and that there must be some
16 apportionment analysis performed. Ms. Riley did no such apportionment, which confirms that her
17 opinions are unreliable.

18 Further, even as to Sprint’s iDEN phones as to which the Court found an issue of fact
19 regarding infringement, 2-Way admitted that the patented features, namely the use of alleged
20 “audio data packets” and an “arbitration value,” are only used sometimes or “occasionally.”
21 Despite this, Ms. Riley failed to show that the patented features drive demand for Sprint’s PTT
22 services, as she must to use the entirety of the \$5 monthly fee as her royalty base. Under relevant
23 Federal Circuit case law, Ms. Riley’s failure to engage in any apportionment analysis on these
24 facts renders her opinions unreliable as a matter of law.

25 **Second**, Ms. Riley improperly utilized a profit-split methodology in determining the
26 “ranges” of royalty rates that she claimed Sprint and 2-Way would be willing to accept during the
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1 hypothetical negotiation, without tying that methodology to the facts of this case. This approach
2 has been specifically rejected as unreliable by the Federal Circuit, and thus should be here as well.

3 **Third**, Ms. Riley improperly relied on “licenses” that she admits are not comparable to the
4 patented technology as the starting point for calculating her reasonable royalty rate. This also
5 renders her damages opinions unreliable under controlling precedent.

6 For any one of these reasons, the methods and manner by which Ms. Riley reached her
7 conclusions are unreliable. Therefore, as explained more fully below, Sprint respectfully requests
8 that the Court preclude Ms. Riley from presenting opinions and testimony at trial.

9 **I. BACKGROUND**

10 2-Way alleges that 77 of Sprint’s iDEN phone models that could perform PTT calls on its
11 iDEN network infringe 2-Way’s now-expired United States Patent No. 5,434,797 (the “’797
12 Patent”). Specifically, 2-Way asserts that Sprint infringes claims 1, 3-6, 17-18, and 20-32 of the
13 ’797 Patent through the PTT functionality of the accused iDEN phones. 2-Way seeks damages in
14 the form of a reasonable royalty for Sprint’s alleged infringement.

15 The ’797 Patent relates to a computer station that can be used for voice communication with
16 another computer station across a computer network while the users simultaneously execute other
17 application programs on their respective computer stations. All of the asserted claims require the
18 use of “audio data packets,” which this Court has found must contain audio data and status
19 information. *See* Dkt. 160 at 5. Further, claim 6 requires that the “audio data packets” have an
20 “arbitration field which contains data which reflects an arbitration value.” *Id.* at 8-9.

21 2-Way originally accused both Sprint’s iDEN phones and Sprint’s QChat phones of
22 infringing the ’797 Patent. These products are multi-feature cell phones that do far more than just
23 PTT – they make ordinary phone calls, may be used to send and receive text messages, and, for
24 some phones, may be used for email, internet browsing, and use of other applications. This Court
25 held on summary judgment that the QChat phones did not infringe the ’797 Patent as a matter of
26 law despite the fact that QChat phones also were used for PTT calls. *See* Dkts. 160 and 164.

1 Additionally, on summary judgment, the Court rejected 2-Way's argument that the iDEN
2 phones infringed every time they used PTT because the claimed "audio data packets" need not
3 contain both audio data and status information, and held that, to the contrary, the claims did in fact
4 require audio data packets with both types of information. In view of this ruling, 2-Way's only
5 remaining theory of infringement requires alleged "bit-stealing" by the iDEN network, a feature 2-
6 Way admitted is only used "occasionally," as well as alleged arbitration functions that are only
7 used, if at all, during times of 1) extremely high network congestion and 2) only on one specific
8 type of PTT call. *See* Dkt. 160 at 6, 9. Because, as 2-Way has admitted, such functions are used, at
9 most, "occasionally," there can be non-infringing PTT calls as well as allegedly infringing calls.

10 However, 2-Way's damages expert Michelle M. Riley provided opinions related to a
11 reasonable royalty that did not focus on the allegedly infringing features, but instead used the entire
12 \$5 monthly fee Sprint charged some customers¹ for the use of PTT as her royalty base, and then
13 applied a percentage royalty to that base. *See* Relevant Excerpts from Expert Report on Damages
14 by Michelle M. Riley ("Riley Report") at ¶¶40-47, attached as Ex. A; Relevant Excerpts from
15 Deposition Transcript of Michelle M. Riley ("Riley Dep.") at 157:18-158:2, attached as Ex. B. In
16 other words, Ms. Riley failed to determine what value, if any, of the \$5 monthly fee for the use of
17 the entire PTT functionality correlated to the alleged value provided by the occasional use of the
18 "bit-stealing" or arbitration function 2-Way contends infringe the '797 Patent. Ms. Riley further
19 failed to correlate the value that any other claimed feature of the '797 Patent contributed to the \$5
20 monthly fee that she posited as the appropriate royalty base for her damages opinions.

21 Further, Ms. Riley used 50% of an alleged "profit premium" to establish the boundaries of
22 the royalty rate range she believed the parties would consider appropriate, based on the theory that
23 the parties would be willing to share this "profit premium." *See* Ex. A, Riley Report at ¶¶73, 74.
24 However, she did not perform any additional analysis into why the parties would be willing to share
25 equally in this alleged "profit premium," and the Federal Circuit has recently rejected as unreliable
26 this same approach.

27 ¹ The majority of Sprint's customers had PTT as part of a bundled plan that included
28 telephone and data services as well in one price per month.

1 Lastly, Ms. Riley relied on a number of “public license agreements” to calculate a starting
 2 point for her reasonable royalty rate calculation, even though she admitted those licenses “are not
 3 fully comparable” to the patented technology. *See* Ex. A, Riley Report at ¶72; *see also* Ex. B, Riley
 4 Dep. 178:13-179:6; *see also id.* at 196:8-14.

5 For all of these reasons, Ms. Riley’s opinions are unreliable and should be excluded.

6 **II. LEGAL STANDARDS**

7 **A. Expert Testimony Must Be Reliable.**

8 Trial courts act as “gatekeepers” tasked with determining whether expert testimony is “not
 9 only relevant, but reliable.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).
 10 Federal Rule of Evidence 702 provides that expert testimony may be admitted only if it is “[1]
 11 based on sufficient facts or data; [2] the product of reliable principles and methods, and [3] the
 12 expert has reliably applied the principles and methods to the facts of the case.” Expert testimony
 13 that fails to meet these criteria must be excluded. *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1313
 14 (Fed. Cir. Apr. 25, 2014) (“a district court judge, acting as a gatekeeper, may exclude evidence if it
 15 is based upon unreliable principles or methods, or legally insufficient facts and data.”); *Uniloc USA,*
 16 *Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011); *IP Innovation LLC v. Red Hat, Inc.*, 705 F.
 17 Supp. 2d 687, 689 (E.D. Tex. 2010).

18 Where expert testimony has been challenged, the burden is on the proponent of the expert
 19 testimony, here 2-Way, to establish its admissibility by a preponderance of the evidence. *Bourjaily*
 20 *v. United States*, 483 U.S. 171, 175-76 (1987). *See also Uniloc*, 632 F.3d at 1315. To carry its
 21 burden, “the patentee must ‘sufficiently [tie the expert testimony on damages] to the facts of the
 22 case.’” *Uniloc*, 632 F.3d at 1315 (alteration in original). “If the patentee fails to tie [its damages
 23 theory] to the facts of the case, the testimony must be excluded.” *Id.*

24 **B. Reasonable Royalties**

25 The patent statute provides that upon a finding of infringement of a valid patent, damages
 26 shall “in no event [be] less than a reasonable royalty for the use made by the infringer” 35
 27 U.S.C. § 284. In this case, 2-Way only seeks reasonable royalty damages from Sprint. The Federal
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1 Circuit has explained that, in “litigation, a reasonable royalty is often determined on the basis of a
2 hypothetical negotiation, occurring between the parties at the time that infringement began.”
3 *Uniloc*, 632 F.3d at 1312 (citations omitted).

4 “A comprehensive (but unprioritized and often overlapping) list of relevant factors for a
5 reasonable royalty calculation appears in *Georgia-Pacific Corp. v. United States Plywood Corp.*,
6 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869
7 (Fed. Cir. 2010). However, “evidence purporting to apply to these, and any other factors, must be
8 tied to the relevant facts and circumstances of the particular case at issue and the hypothetical
9 negotiations that would have taken place in light of those facts and circumstances at the relevant
10 time.” *Uniloc*, 632 F.3d at 1317-18 (emphasis added). “Where . . . such sound economic and
11 factual predicates are absent from a reasonable royalty analysis, Rule 702 requires [the Court] to
12 exclude that unreliable proffered evidence.” *IP Innovation*, 705 F. Supp. 2d at 689.

13 “A reasonable royalty may be a lump-sum payment not calculated on a per-unit basis, but it
14 may also be . . . a running payment that varies with the number of infringing units. In that event, it
15 generally has two prongs: a royalty base and a royalty rate.” *VirnetX, Inc. v. Cisco Sys. Inc.*, 767
16 F.3d 1308, 1326 (Fed. Cir. Sept. 16, 2014). “No matter what the form of the royalty, a patentee
17 must take care to seek only those damages attributable to the infringing features.” *Id.* The Federal
18 Circuit has rejected arbitrary, general damages analyses that are untethered to the facts of a case and
19 the value of the patented technology to the overall product in which the allegedly infringing features
20 are contained. To be admissible, expert testimony opining on a reasonable royalty rate must
21 “carefully tie proof of damages to the claimed invention’s footprint in the market place.” *Uniloc*,
22 632 F.3d at 1317 (quoting *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010)).

23 C. The Law of Apportionment

24 “By statute, reasonable royalty damages are deemed the minimum amount of infringement
25 damages ‘adequate to compensate for the infringement[.]’” and “[s]uch damages must be awarded
26 ‘for the use made of the invention by the infringer.’” *LaserDynamics, Inc. v. Quanta Computer,*
27 *Inc.*, 694 F.3d 51, 66-67 (quoting 35 U.S.C. § 284). The Federal Circuit has “consistently explained
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1 that proof of damages must be carefully tied to the claimed invention itself.” *Apple Inc.*, 757 F.3d
2 at 1324. “Thus, it is generally required that royalties be based not on the entire product, but instead
3 on the ‘smallest salable patent-practicing unit.’” *Laser Dynamics*, 694 F.3d at 67 (quoting *Cornell*
4 *Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283, 287-88 (N.D.N.Y. 2009)). *See also*
5 *VirnetX*, 767 F.3d at 1326 (“when claims are drawn to an individual component of a multi-
6 component product, it is the exception, not the rule, that damages may be based upon the value of
7 the multi-component product.”).

8 Further, under the “entire market value rule,” where the patented invention is “but one part
9 or feature among many” in the smallest salable patent-practicing unit, royalties may be assessed
10 against the total value of the accused product **only if** the patented functionality is the “basis for
11 consumer demand” for the accused product. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301,
12 1337 (Fed. Cir. 2009) (internal quotations omitted); *see also Network Protection Sciences, LLC v.*
13 *Fortinet, Inc.*, No. C 12-01106 WHA, 2013 WL 5402089, at *7 (N.D. Cal. Sept. 26, 2013) (“When
14 using a multi-component product as a royalty base, even if it is the smallest salable unit, a patentee
15 must *still* show that the patented feature drives demand for the entire product.”) (emphasis in
16 original). In other words, “**apportionment** is required even where [] the accused product is the
17 smallest salable unit or where whatever the smallest salable unit is it is still a multi-component
18 product encompassing non-patent related features.” *Dynetix Design Solutions, Inc. v. Synopsys,*
19 *Inc.*, No. C 11-05973PSG, 2013 WL 4538210, at *3 (N.D. Cal. Aug. 22, 2013) (emphasis added);
20 *see also VirnetX*, 767 F.3d at 1327 (finding that the jury instruction was incorrect as it “mistakenly
21 suggests that when the smallest salable unit is used as the royalty base, there is necessarily no
22 further constraint on the selection of the base.”); *Rembrandt Social Media, LP v. Facebook, Inc.*,
23 No. 1:13-cv-158, 2013 WL 6327852, at *5 (E.D. Va. Dec. 3, 2013) (“The smallest salable unit must
24 be closely tied to the patent to suffice, and further apportionment is required even when the accused
25 product is the smallest salable unit”) (citation and punctuation omitted). Thus, “the requirement
26 that a patentee identify damages associated with the smallest salable patent-practicing unit is simply
27 a step toward meeting the requirement of apportionment.” *VirnetX*, 767 F.3d at 1327; *see also id.* at
28

1 1327-28 (“To hold otherwise would permit the entire market value rule exception to swallow the
2 rule of apportionment.”).

3 For example, in *Lucent*, the allegedly patented feature was a “date picker” yet the smallest
4 salable unit was Microsoft Outlook – a software application with numerous features apart from the
5 accused date picker. *Lucent*, 580 F.3d at 1336. The jury awarded damages based on a royalty
6 applied to a royalty base calculated using the entire value of the Microsoft Outlook product. *Id.* at
7 1336. The Federal Circuit held that this failure to apportion the value of the infringing feature was
8 improper because there was no “evidence demonstrating the patented method of the [patent-in-suit]
9 as the basis – or even a substantial basis – of the consumer demand for Outlook.” *Id.* at 1337. The
10 Federal Circuit recently confirmed this rule in *VirnetX*, 767 F.3d at 1329, finding that the patentee’s
11 expert’s testimony was inadmissible and should have been excluded where the expert “did not even
12 try to link demand for the accused device to the patented feature, and failed to apportion value
13 between the patented features and the vast number of non-patented features contained in the
14 accused products.”

15 A patented feature does not create the basis for consumer demand, and thus apportionment is
16 required, unless “the presence of that functionality is what motivates consumers to buy a [product]
17 *in the first place.*” *LaserDynamics*, 694 F.3d at 68 (emphasis added). Thus, to apply a royalty rate
18 to a royalty base consisting of the \$5 monthly fee that Ms. Riley alleges to represent the entire
19 market value of Sprint’s PTT services, Ms. Riley was required to demonstrate that consumers
20 purchased PTT and paid the monthly fee *because of* the use of the patented features. For example,
21 she must show that users paid the monthly fee because they believed it worth \$5 per month for the
22 network to occasionally use the allegedly infringing “bit-stealing” feature or to use the alleged
23 arbitration feature when a user tried to make a group call using PTT during times of network
24 congestion. “In the absence of such a showing [of demand], principles of apportionment apply.”
25 *VirnetX*, 767 F.3d at 1326. Thus, Ms. Riley was required to apply principles of apportionment to
26 determine the portion of the \$5 monthly fee that the “bit-stealing,” alleged arbitration feature, and
27 other elements of the claimed invention represented. She did not do so.

1 **III. ARGUMENT**

2 **A. Ms. Riley's Failure To Apportion Renders Her Opinions Unreliable and** 3 **Inadmissible.**

4 In her report, Ms. Riley opined that the entire value of a \$5 monthly fee Sprint has charged
5 certain customers for PTT services should be used as the royalty base. She based the use of this
6 number on her unsubstantiated belief that the entirety of PTT functionality is accused and that no
7 PTT calls could be accomplished without the patented technology. *See, e.g.,* Ex. B, Riley Dep.
8 205:22-206:2. Thus, she admits she did no apportionment.²

9 However, the \$5 monthly fee for PTT encompasses far more than just the patented features
10 as illustrated by the fact that the QChat phones do not infringe as a matter of law. Further, Ms.
11 Riley has made no showing that the patented technology drives the entire demand for PTT. Thus,
12 the appropriate royalty base should not include the entire \$5 per month fee, but instead should be
13 limited to some apportioned value that reflects *the value of the patented technology* relative to the
14 overall value of PTT on the iDEN accused products.

15 As the Northern District of California found on a similar issue, “[b]ecause [the patentee’s
16 damages expert] relied on the blanket assumption that, once he selected the smallest salable unit . . .
17 he could end the analysis, his determination of the royalty base is fundamentally flawed.” *Dynetix*,
18 2013 WL 4538210, at *4. “[The patentee’s damages expert] improperly skipped this task of
19 apportionment, and his opinion may be excluded on this basis alone.” *Id.* Because Ms. Riley failed
20 to apportion, Ms. Riley’s analysis is fundamentally flawed and should be excluded.

21 1. Ms. Riley Failed to Properly Apportion the Value of the Patented Features.

22 Ms. Riley has failed to show that the patented features formed the requisite basis for
23 consumer demand for Sprint’s PTT functionality. This includes, as described in more detail below,
24 features identified as infringing with respect to Sprint’s PTT functionality - the use of “audio data
25

26 ² The only apportionment Ms. Riley claims she did was excluding a percentage of the sales
27 of the accused phones that did not use PTT at all. However, Ms. Riley did not do any
28 apportionment with respect to how much PTT users actually used PTT, nor did she do any
apportionment with respect to the alleged patented features.

packets,” the use of an “arbitration value,” and the ability to “multitask” while the accused phones are operating. *See, e.g.*, Ex. B, Riley Dep. 119:5-16.

Ms. Riley’s error is confirmed by the QChat products 2-Way previously accused of infringement. The fact that Sprint sold these other PTT devices that the Court has found do not infringe the ’797 Patent confirms that consumer demand for PTT is not driven by these patented features. A patented feature does not create the basis for consumer demand unless “the presence of that functionality is what motivates consumers to buy a [product] *in the first place.*” *LaserDynamics*, 694 F.3d at 68 (emphasis added). Ms. Riley made no distinction between her use of the \$5 per month number for PTT functionality for the non-infringing QChat devices and the remaining accused products. Ex. A, Riley Report at ¶¶41, 47. This demonstrates beyond question that something else is driving consumer demand for PTT and not the “patented features” of the ’797 Patent. Ms. Riley’s failure to perform apportionment to assess the value of the *patented features* relative to the overall value of the push-to-talk services is a fatal error.

(i) “Audio Data Packets”

All of the asserted claims require the use of “audio data packets,” which require that status information and audio data be sent in the same packet. As this Court recognized, “2-Way argues that Sprint *sometimes* sends both audio data and control signals in the same packets.

Dkt. 160 at 6 (emphasis added). Yet, Ms. Riley has not shown that this alleged “occasional” bit stealing has any impact whatsoever on consumer demand for PTT functionality. Nor did Ms. Riley do any apportionment to account for the fact that this feature, and thus any alleged infringement, only occurs at most “sometimes” or “occasionally,” with respect to Sprint’s PTT services.

(ii) Claim 6 – Arbitration Value.

Claim 6 specifically requires the use of not only “audio data packets,” but also an “arbitration value.” *See* Dkt. 160 at 8-9. Mr. Barris, the named inventor on the ’797 Patent,

1 however, stated that this “arbitration” was the essence of the invention. Deposition of Robert Barris
2 54:9-16, attached as Ex. C. Further, Ms. Riley stated during her deposition that she believes that
3 this “arbitration” is one of three important patented features of the ’797 Patent. *See* Ex. B, Riley
4 Dep. 119:5-16. However, Ms. Riley admitted she did not do **any** apportionment to account for the
5 actual use of the alleged arbitration feature. *See id.* at 159:7-10.

6 2-Way’s own arguments regarding infringement confirm the severity of Ms. Riley’s failure
7 to do any apportionment. 2-Way has alleged that Sprint meets the “arbitration value” limitation in
8 claim 6 only in the rare event that a user attempts to make a group call (as opposed to an individual,
9 one-to-one, call) **and** the network is over-loaded. *See* Dkt. 160 at 9. As summarized by this Court:



15 *Id.* (emphasis added).

16 However, Ms. Riley has presented no analysis as to consumer demand for “group calls,” in
17 the first instance, let alone the demand for the alleged “priority” afforded to such group calls “if
18 limited resources are available.” Indeed, the vast majority of the time such alleged arbitration does
19 not even come into play as consumers make one-to-one calls, or the network is not overloaded.
20 Therefore, there is no excuse for Ms. Riley’s failure to apportion with respect to the alleged
21 “arbitration feature” with respect to Claim 6.

22 (iii) “Multitasking”

23 All of the asserted claims require that the “computer station controller [manages] the
24 operations of the audio communication system while other application programs are actively
25 executing[.]” *See generally* ’797 Patent. Ms. Riley referred to this as “multitasking” and opined
26 that it, along with arbitration and allowing users to use a computer network to communicate, was
27 one of the important patented features of the ’797 Patent. *See* Ex. B, Riley Dep. 11:1-10, 119:5-16.
28

1 Ms. Riley explained her understanding of this “multitasking” feature as “[t]he phone is capable of
2 doing other things in addition to or while waiting for a call, being involved in a call.” *Id.* at 120:13-
3 15.

4 Ms. Riley stated that she does not know if there is any demand for this “multitasking”
5 feature. *See* Ex. B, Riley Dep. 192:24-193:1. Nonetheless, as with all other patented features, Ms.
6 Riley admits she did not do any apportionment of her royalty base with respect to the
7 “multitasking” feature. *See id.* at 159:7-10; 215:13-216:11.

8 As shown above, Ms. Riley failed to perform any analysis or show any demand for the
9 patented features and further failed to do any apportionment based on her mistaken belief that the
10 patented features were necessary for *all* PTT calls. *See, e.g.,* Ex. B, Riley Dep. 159:7-10; 205:22-
11 206:2; 213:13-214:11. In fact, Ms. Riley stated that she had no idea whether consumers purchased
12 the accused products based on the features disclosed in the '797 Patent. *See id.* at 192:24-193:1.
13 Ms. Riley’s failure to apportion or show that demand is driven by the patented features is fatal to
14 her proposed testimony. *See VirnetX*, 767 F.3d at 1329 (“The law requires patentees to apportion
15 the royalty down to a reasonable estimate of the value of its claimed technology, or else establish
16 that its patented technology drove demand for the entire product.”); *see also, e.g., IP Innovation*
17 *LLC v. Red Hat, Inc.*, 705 F. Supp. 2d 687, 690 (E.D. Tex. 2013) (“the record cannot support the
18 unfounded conclusion that the often-unused feature drives demand for a royalty base of 100% of the
19 operating systems as a whole.”); *Rembrandt Social Media, LP v. Facebook, Inc.*, 2013 WL
20 6327852, at *5 (E.D. Va. 2013) (excluding the expert report and testimony due to the failure to
21 properly apportion because “allowing Rembrandt's expert to use as the royalty base the entire value
22 of Timeline, News Feed, Groups, and Photo/Video Sharing—all of which can be used
23 independently without infringing—while not using the value of BigPipe and Audience Symbol—the
24 features that actually cause the alleged infringement—would be a mistake of the same kind as
25 allowing Rembrandt's expert to use the entire value of Facebook.”). This is true even if the patented
26 features are “viewed as valuable, important or even essential . . .” *VirnetX*, 767 F.3d at 1326-27
27 (citation omitted). Because Ms. Riley has shown no demand for the patented features and has done
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no apportionment with respect to such features, her testimony should be excluded in accordance with the Federal Circuit's recent ruling in *VirnetX*. See, e.g., *id.* at 1329.

B. Ms. Riley's Use of a Flawed Profit-Sharing Methodology for the Determination of the Royalty Rate Renders Her Opinions Unreliable.

Ms. Riley determined the initial royalty rate ranges for the parties to the hypothetical negotiation date by stating that the parties would be willing to share 50% of the "profit premium" Ms. Riley alleged Sprint received due to its PTT services. However, under Federal Circuit precedent, this renders her opinions unreliable as well. See *VirnetX*, 767 F.3d at 1332.

In *VirnetX*, the Federal Circuit recently rejected the use of a theory that used the same profit-split methodology known as the "Nash Bargaining Solution" where an expert does not sufficiently establish "that the premises of the theorem actually apply to the facts of the case at hand." 767 F.3d at 1332; see also *id.* at 1334 ("the suggestion that those profits be split on a 50/50 basis – even when adjusted to account for certain individual circumstances – is insufficiently tied to the facts of the case, and cannot be supported."). The Nash Bargaining Solution utilizes the assumption, as Ms. Riley did here, that each party to a negotiation would take 50% of profits. See *id.* at 1331-33. The Federal Circuit, however, found that such use, without tying it to the facts of the case, was an "inappropriate 'rule of thumb.'" *Id.* at 1332.

In her report, Ms. Riley utilized 50% of the alleged "profit premium" in two ways.³ First, she used it as a supposed check on the royalty rate range she opines 2-Way would accept. See Ex. A, Riley Report at ¶73. Yet the only justification Ms. Riley offered for using this 50% of the "profit premium" for 2-Way is "[t]hat's generally the analytical approach in kind of profit sharing that's used in patent infringement cases." Ex. B, Riley Dep. 198:24-199:3. As explained above, the Federal Circuit has rejected using a 50/50 split in profits in patent infringement cases, as Ms. Riley has done here without first tying it to the facts of the case as Ms. Riley has *not* done here. See *VirnetX*, 767 F.3d at 1332-33.

³ The use of this so-called "profit premium" is unreliable in and of itself as it was not related solely to the use of PTT, but instead, Ms. Riley used the *entire* profitability of the accused phones and all of their associated wireless services, which includes many more features other than push-to-talk. See Ex. B, Riley Dep. at 197:9-199:3. Again, Ms. Riley performed no apportionment.

1 Second, Ms. Riley used this 50/50 split as the *sole* basis for calculating the ceiling for
2 Sprint's royalty rate range. See Ex. A, Riley Report at ¶74; see also Ex. B, Riley Dep. 219:17-
3 220:1. Ms. Riley justified her use of the 50/50 split for Sprint's ceiling because "[i]t is in books"
4 and she purportedly has used it before. Ex. B, Riley Dep. at 200:11-13. Yet Ms. Riley again did no
5 analysis to tie this 50/50 split to the facts of the case.

6 As explained above, the Federal Circuit in *VirnetX* expressly rejected using a 50% profit
7 split as the starting point for a reasonable royalty calculation based solely on the *ipse dixit* of an
8 expert. See *VirnetX*, 767 F.3d at 1331-34. As a result, Ms. Riley's use of a 50/50 split of the so-
9 called "profit premium" does not serve as an adequate check on her improper range for 2-Way or as
10 a proper ceiling for Sprint's royalty rate range, but instead reinforces that her calculation of the
11 respective ranges for both parties as the starting point of her reasonable royalty rate analysis is
12 unreliable and should be excluded. See *id.*

13 **C. Ms. Riley's Improper Reliance on Irrelevant License Agreements Renders Her**
14 **Opinions Unreliable and Inadmissible.**

15 The Court also should exclude Ms. Riley's testimony because she relied on irrelevant
16 "license agreements" to arrive at her claimed royalty rate. "[L]icenses relied on by the patentee in
17 proving damages [must be] sufficiently comparable to the hypothetical license at issue in the suit."
18 *Lucent*, 580 F.3d at 1325. "The testimony of a damages expert in a patent suit who relies on non-
19 comparable licenses in reaching his royalty rate *should be excluded*." *DataQuill Ltd. v. High Tech*
20 *Computer Corp.*, No. 08CV543-IEG BGS, 2012 WL 1284381, at * 4 (S.D. Cal. Apr. 16, 2012)
21 (emphasis added); see, e.g., *ResQNet*, 594 F.3d at 871 ("[The expert] did not even attempt to show
22 that these agreements embody or use the claimed technology or otherwise show demand for the
23 infringed technology. . . . The . . . licenses simply have no place in this case.").

24 The "license agreements" Ms. Riley relied on came from a database maintained by her
25 company and included not only license agreements, but also jury awards from patent infringement
26 lawsuits. See Ex. A, Riley Report at ¶58. Importantly, Ms. Riley admits that the "license
27 agreements" she relied on are not "fully comparable" to the technology disclosed in the '797 Patent
28

1 to calculate the starting point for her royalty rate analysis.⁴ Ex. B, Riley Dep. 178:13-179:6; *see*
 2 *also id.* at 196:8-14 (“I don’t think they are fully comparable. They are not for Push-to-Talk[.]”);
 3 Ex. A, Riley Report at ¶72. Indeed, the only reason she identified at her deposition for relying on
 4 these licenses was that “they are not 20 to 50 percent, they are basically 5 and under, so that kind of
 5 gives me some idea of a range for what we are talking about here.” Ex. B, Riley Dep. at 196:15-19.
 6 Such a conclusory and vague basis for using non-comparable licenses is not adequate. *See*
 7 *LaserDynamics*, 694 F.3d at 79 (“[w]hen relying on licenses to prove a reasonable royalty, alleging
 8 a loose or vague comparability between different technologies does not suffice.”).⁵

9 Therefore, because the non-comparable licenses Ms. Riley used as the starting point for her
 10 reasonable royalty analysis is unreliable, her subsequent reasonable royalty calculation necessarily
 11 is unreliable and must be excluded. *See Uniloc*, 632 F.3d at 1317 (“Beginning from a
 12 fundamentally flawed premise and adjusting it based on legitimate considerations specific to the
 13 facts of the case nevertheless results in a fundamentally flawed conclusion.”).

14 **IV. CONCLUSION**

15 As discussed above, there are at least three independent and sufficient reasons why Ms.
 16 Riley’s opinions regarding the proper royalty base and royalty rate are unreliable and should be
 17 excluded. As the royalty rate and base are central to any damages calculation in this matter, the jury
 18 would not be assisted in its role by Ms. Riley’s testimony. Therefore, the Court should exclude Ms.
 19 Riley’s testimony in its entirety.

23 ⁴ Not only are the “licenses” not comparable to the patented technology, they are also not all
 24 “licenses,” much less “patent license agreements,” and further cover a time period ranging from
 November 4, 1991 to February 28, 2011 with no explanation by Ms. Riley why they were used in
 light of her hypothetical negotiation date, or why 2-Way would rely on them.

25 ⁵ The unreliability of Ms. Riley’s use of such non-comparable “licenses” is highlighted by
 26 the fact that one of these “licenses” was a district court case where the jury utilized a 5.5% royalty
 27 rate for its damages award, which Ms. Riley used as her sole support for the highest rate in her
 28 royalty range for 2-Way (Ex. B, Riley Dep. 199:4-9). However, that ruling was subsequently
 vacated and remanded by the Federal Circuit. *See* Ex. B, Riley Dep. 87:1-88:15; *see also* Ex. A,
 Riley Report at ¶58.

1
2 Dated: October 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years. On this date, I caused to be served a true and correct copy of the foregoing DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF MICHELE M. RILEY by the method indicated:

<u>XXX</u>	by the Court's CM/ECF Program
_____	by U. S. Mail
_____	by Facsimile Transmission
_____	by Electronic Mail
_____	by Federal Express
_____	by Hand Delivery

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